

WORKPLACE HARASSMENT



Sioux Falls Human Relations Commission
224 West Ninth Street
Sioux Falls, SD 57104
605.367.8745



Workplace Harassment

What impact do you have on your organization's diversity?

Tolerance → Acceptance → Understanding → Embrace

Workplace harassment is prohibited by federal, state and local law. Harassment not only includes sexual harassment but also harassment on the basis of race, color, sex, creed, religion, ancestry, national origin, or disability. It has a negative impact on the person(s) targeted by the behavior (the offended), can cause major disruptions at work by affecting the morale of coworkers (the observers), and could result in disciplinary action, including termination, for harassers (the offenders). Certain types of harassment, such as sexual harassment, can create legal liability for the employer. There are no winners in cases of workplace harassment.

I. General

Harassment based on sex, race, religion, national origin, age, disability, ancestry, creed, or a protected activity (opposition to discrimination or participation in complaint proceedings) constitutes unlawful discrimination in violation of federal, state, and local laws.

II. Elements of Harassment Claim

- A. The challenged conduct must be **unwelcome**.
- B. The complainant must have been subjected to the conduct because of his or her sex, race, religion, national origin, age, disability, or **because he or she opposed discrimination or participated in complaint proceedings**.
- C. The challenged conduct must have resulted in a **tangible employment action** or a **hostile work environment**.

- D. There must be a legal basis for holding the employer **liable** for the harassment.
- III. Unwelcomeness
- A. Harassment is unlawful only if it is unwelcome to the complainant. “Unwelcome” means that the employee did not solicit or invite the conduct **and** regarded it as undesirable.
 - B. The critical inquiry is whether the complainant explicitly or implicitly communicated to the alleged harasser that the conduct was unwelcome.
 - Submissions to sexual demands do not mean that the demands were welcome, but active participation in the challenged conduct would likely defeat a claim.
- IV. Basis
- A. Harassment based on sex violates Title VII whether or not sexual conduct is involved.
 - B. If the harasser and the target are the same sex, a violation can still be found as long as the victim was targeted because of his or her gender.
 - C. Harassment based on race, color, religion, national origin, age over 40, disability, or protected activity (opposition to discrimination or participation in discrimination complaint proceedings) also violates antidiscrimination laws.
- V. Harassment That Results in a Tangible Employment Action
- A. **Definition:** A supervisor’s harassment culminates in termination of the employee, denial of promotion, or some other significant change in employment status.
 - B. *Only* a supervisor can commit this form of harassment.
 - C. **Employer liability:** An employer is *automatically* liable for this type of harassment, regardless of whether upper management had knowledge of it.
- VI. Hostile Environment Harassment
- A. **Definition:** Unwelcome comments or conduct based on sex, race, or other protected class unreasonably interferes with an employee’s work

performance or creates an intimidating, hostile, or offensive work environment.

- B. *Anyone* in the workplace might commit this type of harassment—a supervisor, coworker, or nonemployee.
- C. Standards governing whether unwelcome sexual conduct creates an unlawful hostile environment:
 - 1. Relevant factors may include: the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.
 - 2. The key issues are **frequency** and **severity**: The more severe the conduct, the less frequent it must be to create a hostile environment; the less severe, the more frequent it must be.
 - Both objective and subjective standards apply:
 - i. Objective: Whether a “reasonable person” would find the environment abusive.
 - ii. Subjective: Whether complainant found his or her environment abusive.
 - 3. Nothing tangible about the individual’s job need be affected.
 - 4. Severe psychological harm is not necessary to establish a violation.

VII. **Employer Liability**

- A. Hostile environment harassment by supervisors: **The employer is liable even if higher management did not know of the supervisor’s harassment, unless it can prove that:**
 - It exercised reasonable care to prevent and correct promptly any harassment; **and**
 - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

- B. Hostile environment harassment by coworkers: **The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.**
- C. Hostile environment harassment by nonemployees: **The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.**

VIII. Preventative and Corrective Measures

A. Antiharassment Policy

1. An employer should establish and disseminate to all employees a policy prohibiting harassment on all protected bases.
2. An antiharassment policy should make clear that employees will be protected against retaliation for making complaints or for assisting in investigations.
3. An antiharassment policy should explain the procedure for complaining of harassment by anyone in the workplace or in work-related settings, and make clear that management will act quickly in responding to such complaints. The policy should make clear that employees can complain about harassment at an early stage, before it becomes severe or pervasive.
4. The complaint procedure should designate more than one official to receive complaints, since a designated official might be the alleged harasser.
5. Supervisors should be instructed to take immediate and appropriate corrective action whenever they are aware of harassment, including reporting the matter to appropriate officials.

B. Investigating Allegations of Harassment

1. The investigation should be **prompt, thorough, and impartial.**
2. **Confidentiality** should be protected to the extent possible. Information should be shared only with those who have a need to know.

3. All persons interviewed should be told that employees who complain of alleged harassment or participate in the investigation are protected against **retaliation**.
- C. Corrective Action
1. If it is determined that harassment occurred, corrective action should be undertaken **immediately**.
 2. Corrective measures should be designed to **end** the harassment and ensure that it **does not recur**.
 - The severity of disciplinary action should depend on the severity and frequency of the misconduct. They should be proportionate to the seriousness of the offense.
 3. Corrective measures should *not* adversely affect the complainant; e.g., if the harasser and the target must be separated, the harasser should be moved.
- D. Other Preventative Measures
1. Routinely educate employees about what constitutes unlawful harassment and about the employer's antiharassment policy and complaint procedure.
 2. Train supervisors how to identify and respond to harassment.
 3. Monitor enforcement of the antiharassment policy.

Jeff Munce
Sioux Falls Human Relations Commission
224 West Ninth Street
Sioux Falls, SD 57104
605-367-8745

Hostile Work Environment

A sexually hostile work environment can be created by:

- Discussing sexual activities.
 - Unnecessary touching.
 - Commenting on physical attributes.
 - Displaying sexually suggestive pictures.
 - Using demeaning or inappropriate terms, such as “babe.”
 - Using unseemly gestures.
 - Ostracizing workers of one gender by those of another.
 - Granting job favors to those who participate in consensual sexual activity.
 - Using crude and offensive language.
-

If you are unclear whether your behavior may be offensive, ask yourself the following questions:

1. Would you talk or behave in this manner with your spouse or kids present?
2. Would you want your behavior broadcast on the evening news?
3. Is there equal initiation and participation?
4. Would you want one of your family members to be treated in this manner?
5. If your answer is no, then your behavior could likely be offensive and unwelcome.

Steps to Take if Harassed at Work

- Remain professional.
- Be direct with the harasser. Let him/her know that you do not like the behavior and that you want it to stop immediately.
- If the behavior continues, follow your company's grievance procedure and report the incident to your supervisor. If the harasser is your supervisor, you should go to someone of higher authority with your concerns.
- File a report or complaint with your designated company official(s).
- Once you have reported incidents of harassment, you are protected from retaliation.
- When reporting harassment, be specific, but be prepared to share all facts about the incident(s). Write down important details of the incident(s).
- Collect your thoughts before you begin; remember to provide who, what, when, where, how, and any witnesses.

Harassment Investigation

Guidelines for the Investigation:

You must investigate no matter how trivial the situation appears.

You must take **TIMELY** and **APPROPRIATE** action.

Gather facts—don't make judgments (who, what, when, where, why, and how).

Set professional tone for interviews.

Maintain Confidentiality:

Emphasize confidentiality to all parties.

Limit access to information.

Inform those involved that they will be required to keep this confidential. If not, then discipline will be taken.

Keep an eye out for retaliation.

Who To Interview:

- ✓ Complainant
- ✓ Alleged harasser (if needed)
- ✓ Coworkers who may have witnessed alleged behavior (if needed)
- ✓ Others (if needed)

Resolve The Complaint:

Do not try resolving the issue by putting the charging party and the alleged harasser in a room together. Not only is this intimidating, it can be considered retaliation.

Consider severity of the conduct.

The response should match the severity of the offense—oral or written warnings, reprimand, suspension, or termination.

Conduct follow-up interviews with the harasser and the victim to tell each person what is happening and why.